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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHERE THE GRAND JURY INDICTMENT CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSES, THE JURY INSTRUCTIONS REQUESTED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED MATERIALITY AS AN ELEMENT OF THE OFFENSES, AND WHERE THE GOVERNMENT DID NOT OBJECT OR OTHERWISE ARGUE TO THE DISTRICT COURT THAT MATERIALITY IS NOT A REQUISITE ELEMENT OF SECTION 1014 WHEN THE DISTRICT COURT MADE ITS RULINGS REGARDING MATERIALITY.

II. WHETHER THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE.

III. IF THIS COURT DETERMINES THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014, WHETHER THE CASE MUST STILL BE REMANDED FOR A NEW TRIAL BECAUSE THE JUDGE'S DETERMINATION OF MATERIALITY AND INSTRUCTION TO THE JURY TO DISREGARD MATERIALITY ESSENTIALLY TOOK AWAY FROM THE JURY'S DETERMINATION THE ELEMENTS OF "PURPOSE OF INFLUENCING" AND WHETHER THE STATEMENT WAS "FALSE."

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No. 95-1228

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY E. WELLS
and
KENNETH R. STEELE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINION BELOW

The Respondents accept the Petitioner's statement of the Opinion Below as set forth in the Brief for the United States.

JURISDICTION

The Respondents accept the Petitioner's statement of Jurisdiction as set forth in the Brief for the United States.

STATUTORY PROVISION INVOLVED

The Respondents accept the Petitioner's statement of the statutory provision involved as set forth in the Brief for the United States.

STATEMENT OF THE CASE

The Respondents were each charged by Indictment in the United States District Court for the Western District of Missouri with one count of conspiracy to make material false statements to a financial institution in violation of 18 U.S.C. § 371, and four counts of making material false statements to financial institutions, in violation of 18 U.S.C. § 1014. *See* Pet. App. 2a; J.A. 18-34. The Respondents entered pleas of not guilty to all charges. Before trial, one false statement count was dismissed by the district court for failure to state an offense. Following the close of all the evidence, the district court also granted judgments of acquittal on two other false statement counts. Thus, the conspiracy to submit material false statements count and the substantive false statement count were submitted to the jury. Pet. App. 6a.

After its deliberations, the jury returned verdicts of guilty on both counts. Pet. App. 2a. Each Respondent was sentenced to a term of two years probation on each count to run concurrently. The United States Court of Appeals for the Eighth Circuit vacated the convictions and remanded the case for a new trial in light of this Court's decision in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), on the grounds that the

district court, rather than the jury, determined materiality. *See generally* Pet. App. 8a-14a.

The allegations involved a photocopier sales, leasing, and service company that was purchased and jointly owned by the Respondents and a convicted co-conspirator, James Russell. After the parties' purchased this company, the Respondents and Russell renamed the company Copytech Systems, Inc. (hereinafter "Copytech"). Pet. App. 3a. Respondent Wells served as the chairman of the board and secretary of Copytech, Respondent Steele served as the president, and Russell served as the chief executive officer and vice president. Record 138-40, 1585.

Russell had been vice president of sales at the predecessor company to Copytech, and he had many years of experience in the photocopy industry. Record 130-31, 284, 1098-1100, 1584. Neither Wells nor Steele had any prior experience in the sales, leasing, or service of photocopier systems. Wells was engaged in the full-time practice of law and only went to Copytech for occasional visits and status meetings. Record 494-95, 570, 1130-31, 1374-76. Steele was present at Copytech on a daily basis. However, Steele did not participate in the day-to-day management of Copytech. Record 1585-90, 1362-70. The Respondents initially relied on Russell to make all major business decisions regarding the company and its day-to-day operations. For some time, Russell was perceived by the employees as the ultimate decision maker. Record 525-27, 567-70, 145, 1106-12, 1368-75, 1585-90. However, the Respondents did become more actively involved in the company for a short time period after Russell experienced an emotional illness. Record 1666-72.

While working at the predecessor company to Copytech, Russell became familiar with a copier program that allowed the leased equipment, supplies, and service to be paid for by customers in one monthly payment. This program was also utilized by Copytech and was called Copier Management

Program, or "CMP." Record at 1116-20, 150. This program consisted of two distinct features: a lease of certain photocopier equipment and an option for a service agreement. Pet. App. 4a. Copytech customers were not required to purchase the service agreement and some customers did in fact refuse the service portion of the program. Record at 1175-78. Copytech obtained financing by selling its rights to the income under the lease agreements, but not its liabilities, to various financial institutions that would essentially discount the future income stream from the lease agreements. Pet. App. 4a. In some instances, the principals of Copytech and their respective spouses had to sign personal guarantees when Copytech obtained this financing. Record at 181-87.

The Government's theory at trial was that the Respondents and Russell conspired to withhold and conceal the fact that there was a separate service agreement related to the lease contracts that were being purchased by financial institutions. Three overt acts were submitted to the jury under the conspiracy charge. One of those acts alleged the Respondents made false statements to the banks by providing the lease contracts that stated maintenance was the responsibility of the lessee, but not providing the separate service agreement. J.A. 29, 40. The second overt act alleged that James Russell made similar false statements to banks. J.A. 40-41. The third overt act alleged that the Respondents had signed their wives' names to personal guarantees to influence the bank in purchasing the lease contracts. J.A. 28, 40. This overt act was also the substantive false statement count charged in Count Two. J.A. 30-31.

The Government's evidence regarding the conspiracy charge rested almost entirely on the testimony of James Russell. Russell testified pursuant to a plea agreement wherein he pled guilty to three counts of bank fraud and conspiracy to commit bank fraud. Pet. App. 3a n.1. Pursuant to the plea agreement, the Government agreed to consider filing a motion

for downward departure under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) for his substantial assistance in giving testimony against the Respondents in this case. Record 128-30, 345.

Russell testified at trial that some of the financial institutions wanted Copytech to keep a reserve fund to cover "soft costs" (costs to service equipment over and above equipment costs). Record 155-56, 165-68. Russell testified that, to avoid the "soft costs" reserve, Copytech altered its lease agreement to state that the lessee was responsible for maintenance, and then a separate CMP service agreement would be added as an addenda to the lease agreement. Record 162-68. Only the lease would be sent to the financial institutions.

The Respondents at trial defended themselves, in part, on the grounds that the omission of the CMP agreement from the bank was not material. Thus, Respondent Wells testified at trial that his goal in separating the two agreements was to make the lease non-cancelable, so the rent obligation was absolute and certain, even if a dispute arose under the service agreement. Record 1143-44. This was done to insulate the banks from any responsibility or liability under the separate service agreement. Record 1153-54, 1302. Wells and Steele both denied at trial any agreements to conceal the service agreements. Record 1187, 1603-04.

Russell's testimony also indicated that officials from one of the financial institutions involved in this case were provided an overview of CMP and even inspected lease files with the CMP service agreements included in those files. Record 177-80. Russell also acknowledged that he used a flip chart in making presentations to the banks that described CMP in great detail. Record 240-41. In addition, Copytech provided financial statements to the banks that contained an extensive description of Copytech's programs, including the service agreement options. Record 255-58.

It should also be noted that, in many instances, the financial institutions required that the payments be mailed by

customers directly to a bank lock-box. Record 680-81. Since the CMP customers paid the lease and the service contract in one payment, the financial institutions would actually receive more money from the customers than the monthly lease payment. Thus, the bank knew there were additional matters outside the lease contained in the payment, and deposited the excess funds in a Copytech account.

The Respondents were also convicted of violating 18 U.S.C. § 1014 for signing their wives' names to personal guaranties.[1] At trial, the Respondents claimed that the statements were not false because they had or believed they had their wives' authority and because the signatures were not material. Record 1191, 1322-24, 1642.

After all the evidence was adduced at trial, the district court ruled that the remaining false statements in question were material. At this time, the Respondents argued to the Court that materiality should be an issue submitted to the jury.[2] Thus, this issue was properly preserved by the Respondents. *See* Pet. App. 7a n.3. When the district judge ruled on materiality issues, the Government did not argue, suggest or submit that materiality should not be an essential element of 18 U.S.C. § 1014.

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1. The evidence at trial, through the testimony of James Hayes, former chairman of O'Bannon Bank, indicated that Regulation B of the Code of Banking Regulations, 12 C.F.R. § 202.7(d)(1), prohibited financial institutions from requiring the signature of an applicant's spouse other than on a joint application for credit transaction, if the applicant otherwise qualifies under the creditor's standards of creditworthiness. Record 730-35. Thus, the Respondents argued at trial that the signatures of the wives could not have been material in light of this regulation prohibiting the bank from obtaining the spouses signatures.

2. In ruling on the issue of materiality, the district judge was also of the opinion that materiality was a jury issue. Pet. App. 8a n.4; Record 1731. However, the judge felt bound by then-controlling Eighth Circuit law which required him to determine materiality. *Id.*

The Respondents appealed their convictions to the Eighth Circuit and the Government cross-appealed on several sentencing issues. In its initial brief on appeal, the Government did not raise the issue that materiality is not an element of 18 U.S.C. § 1014. Instead, the Government consistently acknowledged throughout its brief that materiality is an element of section 1014 that the Government met its burden at trial of proving that the statements at issue were material and that the district judge acted appropriately in determining that the statements were material. J.A. 50-60.

During the pendency of the appeal to the Eighth Circuit, this Court decided *United States v. Gaudin*, 115 S. Ct. 2310 (1995). In light of *Gaudin*, the Eighth Circuit requested supplemental briefs from the parties. *See* J.A. 61-77. Only after the *Gaudin* decision and the Eighth Circuit's request for supplemental briefs did the Government raise its argument for the first time that materiality is not an essential element of 18 U.S.C. § 1014. *See* J.A. 61-69.

In its decision below, the Eighth Circuit recognized that materiality has been traditionally held to be an element of section 1014 by most courts, and has traditionally been a matter of law for the judge to decide. Pet. App. 7a, 12a. Moreover, the Eighth Circuit recognized that similar fraud statutes, like section 1014, which do not explicitly enumerate materiality in the text of the statute, nevertheless have been found by a number of courts to require materiality as an element of proof. *See* Pet. App. 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980). The Eighth Circuit saw no reason to treat section 1014 differently than similarly worded false statement statutes, like section 1001. Pet. App. 12a. Thus, the Eighth Circuit explicitly recognized and restated the rule that numerous other courts have previously adopted, that materiality is an essential element of section 1014. *Id.*

Since the judge determined materiality in the trial below, the Eighth Circuit concluded that the mandate of *Gaudin* was

violated. Thus, the court reversed and remanded the case for a new trial. Pet. App. 14a.

SUMMARY OF ARGUMENT

The Government consistently charged materiality in the indictment and included materiality in its instructions submitted to the district court. The Government also stood silent and did not object or otherwise argue to the district court that materiality should not be determined. Charging materiality in the indictment and including it in the instructions is effectively a concession by the government that materiality is an element in this particular case. Further, the law of the case doctrine recognizes that jury instructions, which are not objected to, become the law of the case, even if those instructions contain elements that are not necessarily included in the statutory definition of the offense. The Government's failure to object to the determination of materiality is a waiver of that issue for appellate review. The Government cannot charge materiality in the indictment, offer instructions that contain materiality as a requisite element, stand silent when the district court rules on materiality, and then reverse its position by complaining to this Court that it is entitled to relief on the issue of materiality.

Materiality is an element of 18 U.S.C. § 1014. Almost every federal circuit, with the exception of the Second Circuit, has consistently concluded that materiality is an element of section 1014, despite the lack of materiality in the actual text of the statute. Some courts have recognized that materiality in false statement offenses has been recognized at common law. Although the actual text of the statute does not contain materiality, courts have long looked beyond the text of statutes in numerous contexts, including the definition of a false statement under section 1014 to include "omissions."

The legislative history of section 1014 is also silent as to Congress' intent regarding materiality. Silence of the legislature

is not always indicative of any certainty of congressional purpose. Further, the Revisor's Notes following section 1014 indicate that Congress did not intend to make any substantive changes to the law when it consolidated 13 predecessor statutes into section 1014. This statement in the Revisor's Notes indicates that Congress overlooked the issue of materiality when it enacted section 1014. Further, the Revisor's Notes reveals an ambiguity regarding congressional intent regarding materiality. When such an ambiguity exists, that ambiguity should be resolved in favor of lenity. Further, courts are not bound by the text of the statute when the congressional intent indicates that Congress has made a drafting error in enacting the statute.

Courts have recognized that broad-sweeping criminal statutes with potentially harsh penalties should be strictly construed. The importance of materiality in section 1014 cases is to exclude from prosecutions trivial or insignificant false statements that are not capable of influencing financial institutions.

Finally, if materiality is not an element of section 1014, the Judge's instructions to the jury in this case that define materiality, use materiality to define whether a statement is false, and then instruct the jury to disregard any considerations of materiality essentially took away from the jury the determination of the elements of "for the purpose of influencing" and whether the statement was "false," which are undisputed elements of a section 1014 offense.

Thus, for all of these reasons, this Court should conclude that materiality is an element of a section 1014 offense, and that materiality should be decided by the jury. Therefore, this case should be remanded to the district court. However, if this Court decides that materiality is not a required element of section 1014, because the district court's jury instructions preempted the jury or unduly suggested to the jury what its decision should be with respect to other elements of

section 1014, this case must still be remanded to the district court.

ARGUMENT

I. THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHERE THE GRAND JURY INDICTMENT CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSES, THE JURY INSTRUCTIONS REQUESTED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED MATERIALITY AS AN ELEMENT OF THE OFFENSES, AND WHERE THE GOVERNMENT DID NOT OBJECT OR OTHERWISE ARGUE TO THE DISTRICT COURT THAT MATERIALITY IS NOT A REQUISITE ELEMENT OF SECTION 1014 WHEN THE DISTRICT COURT MADE ITS RULINGS REGARDING MATERIALITY.

The Government is asking this Court to determine whether the materiality of a false statement is a required element to prove a violation of 18 U.S.C. § 1014, which makes it an offense to knowingly make a false statement or report for the purpose of influencing in any way the action of a federally insured bank. However, the Government included materiality as a requisite element of the offenses charged in the indictment and in the jury instructions it offered to the district court, which were ultimately submitted to the jury. The Government did not raise this issue at any time during the trial below or in any of the opening appellate briefs submitted to the United States Court of Appeals for the Eighth Circuit. Only after the Eighth Circuit requested supplemental briefs in light of *United States v. Gaudin*, 115 S. Ct. 2310 (1995), regarding its application to the present case, did the Government claim for the first time that materiality is not an element of section 1014. For the reasons submitted herein, the Government cannot charge materiality in

the indictment, offer instructions that contain materiality as a requisite element, stand silent when the district court makes its rulings regarding materiality, and then completely reverse its position by complaining to this Court that it should somehow be entitled to relief on the issue of materiality.

A. The Grand Jury Indictment Charged Materiality

The indictment included numerous allegations of materiality as an element of the charged offenses. For example, Count One of the Indictment alleges that the Respondents "made and caused to be made false statements and representations and withheld information of *material fact* for the purpose of influencing . . . ." J.A. 24 (emphasis added). Count One goes on to allege: "JERRY E. WELLS and KENNETH R. STEELE knowingly withheld and caused to be withheld . . . *material* information concerning the lease contracts . . . ." J.A. 25 (emphasis added).[3] In addition, the substantive false statement charge in Count Two included materiality as an element of the offense: "JERRY E. WELLS and KENNETH R. STEELE knowingly made and caused to be made false statements of *material fact* to O'Bannon Bank . . . ." J.A. 31 (emphasis added). Thus, materiality was consistently included as an element of the offenses charged in the indictment by the grand jury.

Since materiality was included as an element of the offenses charged, the Government was required to prove materiality in this particular case. This Court has long recognized the fundamental rule that a defendant has the distinct constitutional right, protected by the Fifth Amendment, to be

3. There were additional references to materiality in the conspiracy count regarding the objects and overt acts of the other substantive false statement counts, which were ultimately dismissed by the district court. *See generally* J.A. 18-34.

tried only upon those charges found by a grand jury. *See, e.g., Stirone v. United States*, 361 U.S. 212, 215-16 (1960); *see also United States v. Staniforth*, 971 F.2d 1355, 1357 (7th Cir. 1992) ("In the federal system, if you are indicted for X, you cannot be convicted of Y . . . because that would deny you your right not to be charged with a federal crime other than by a grand jury."); *United States v. Camp*, 541 F.2d 737, 740-41 (8th Cir. 1976). Only a grand jury, and not a trial court, can materially amend a criminal indictment. *Stirone*, 361 U.S. at 215-16.[4] In the present case, the words of the indictment evidence that the grand jury considered and included materiality as an essential element of the charged conduct.

Any suggestion that materiality could somehow be "deleted" from the indictment as mere surplusage would be an impermissible amendment to the indictment. An exception to the general rule that an indictment cannot be amended except by the grand jury has been recognized which allows a court to eliminate surplusage as a matter of form if nothing is added to the indictment and the remaining allegations state the essential elements of the offense. *See, e.g., United States v. Nabors*, 762 F.2d 642, 647 (8th Cir. 1985). Permissible amendments include the correction of obvious clerical or typographical errors. *E.g. United States v. Fields*, 875 F.2d 130, 133 (7th Cir. 1989). Courts may also ignore as surplusage allegations in an indictment that are additional offenses independent from the offense of conviction or allegations that are additional methods to commit the offense of conviction. *See, e.g., United States v.*

4. *Stirone* involved an expansion of the charges outlined in an indictment without further grand jury action. *Stirone*, 361 U.S. at 216. The Court recognized the inherent constitutional violation that occurs when a defendant is tried on charges that are not made in the indictment. *Id.*

Miller, 471 U.S. 130, 135-36 (1985).[5] However, none of these circumstances are present in this case. To somehow ignore or delete materiality as surplusage would be an improper and unconstitutional amendment of the indictment in violation of the Fifth Amendment right to be charged by grand jury indictment.

In addition, the fact that the indictment charges materiality as a requisite element of the offenses is an effective concession by the Government that materiality must be proved in this particular case. This circumstance was addressed by the First Circuit in *United States v. Norberg*, 612 F.2d 1 (1st Cir. 1979), which also involved 18 U.S.C. § 1014. In *Norberg*, the Government charged the defendant under section 1014 with making or causing to be made "materially false statements." *Id.* at 1, n.3. The court concluded that, since the indictment charged materiality, the Government conceded, for the purposes of the case, that it had to prove materiality. *Id.* Thus, the First Circuit did not even reach the ultimate question of whether

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5. The Government's reply brief in seeking certiorari suggested that materiality could be ignored or deleted as surplusage or as a useless averment, under *United States v. Miller*, 471 U.S. 130 (1985). *See* Govt. Reply Br. to Br. in Opp. on Cert. 4-5. The *Miller* Court concluded that if the offense of conviction is fully and clearly set out in the indictment, the constitutional right to a grand jury may not be violated if the indictment alleged more crimes or independent means of committing the same crime. *Id.; see also Ford v. United States*, 273 U.S. 593, 602 (1927) (indictment charging violation of federal law as one offense and violation of a treaty as another independent offense, even though the treaty did not create a separate offense, was deemed valid because the treaty offense could be deleted or ignored as mere surplusage). These cases allow surplusage to be ignored only if it is unnecessary to and independent of the offenses of conviction. *Miller*, 471 U.S. at 136; *Ford*, 273 U.S. at 602. In contrast to these cases, materiality in this case is an inextricable element of the offenses of conviction that is not an independent offense or an independent means of commiting the offenses of conviction. Thus, *Miller* and *Ford* cannot be relied on by the Government to suggest that materiality can be ignored in this case.

materiality is an essential element of section 1014 cases in general. *Id.*[6] The Government's inclusion of materiality in the indictment is thus an effective concession that it must prove materiality as a requisite element in this particular case.

B. The Government's Jury Instructions Included Materiality

The Government also included materiality in its jury instructions offered to the district court and ultimately submitted to the jury. In this regard, Instructions 13, 15, 18, and 20, which were all offered by the Government, included materiality as a requisite element. J.A. 38-43. In fact, Instruction 20 defined materiality, but then instructed the jury that it should not be concerned with the issue of materiality.[7] J.A. 42-43.

The Federal Rules of Criminal Procedure preclude a party from assigning as error any portion of the jury instructions or omissions therefrom unless that party objects to the instructions before the jury retires to consider its verdict. Fed. R. Crim. P. 30. In addition, a party cannot complain as to the language or contents of a jury instruction which that party itself requested and to which the party did not object after the instruction was submitted to the jury. *United States v. Jacoby*, 955 F.2d 1527, 1544 (11th Cir. 1992), *cert. denied*, 507 U.S.

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6. The *Norberg* opinion predated subsequent First Circuit opinions that did in fact conclude that materiality is a requisite element of section 1014. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960-61 (1st Cir. 1995); *United States v. Concemi*, 957 F.2d 942, 951 (1st Cir. 1992).

7. Instruction 20 stated in relevant part: "A statement or representation is 'false' when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." J.A. 42.

920 (1993). The Government's claim that materiality is not a required element under section 1014 rings hollow in light of the fact that the Government charged materiality in the indictment and requested materiality in its jury instructions offered to the district court, which were ultimately submitted to the jury.

Materiality is thus a requisite element in this particular case under the doctrine of "the law of the case." Numerous federal courts have recognized that a jury instruction which is not objected to becomes the law of the case. *See, e.g., United States v. Jokel,* 969 F.2d 132, 136 (5th Cir. 1992) (a jury instruction that increases the Government's burden and to which the Government does not object becomes the law of the case); *United States v. Abod,* 770 F.2d 1293, 1295 n.1 (5th Cir. 1985); *United States v. Johnson,* 495 F.2d 242, 243-44 (10th Cir. 1974).

Several federal appellate courts have invoked the "law of the case" doctrine in analyzing cases brought under the federal escape from custody statute, 18 U.S.C. § 751. Although some of these courts concluded that specific intent was not a requisite element under section 751, they nevertheless concluded that, since instructions were submitted to the jury that required a finding of specific intent, without any objection from the Government, then specific intent was a requisite element of these cases under the law of the case doctrine. *E.g. United States v. Tapio,* 634 F.2d 1092, 1094 (8th Cir. 1980); *United States v. Spletzer,* 535 F.2d 950, 954 (5th Cir. 1976); *United States v. Woodring,* 464 F.2d 1248, 1251 (10th Cir. 1972).

Similarly, the Tenth Circuit was confronted with the issue of whether a RICO conspiracy requires proof that the defendant personally agreed to commit two predicate acts or whether the defendant agreed that any conspirator would commit the two predicate acts. *See United States v. Killip,* 819 F.2d 1542, 1547-48 (10th Cir. 1987), *cert. denied,* 484 U.S. 865 (1987). However, the court did not even reach or

determine this issue because the jury had been instructed that the defendant must personally agree to commit the predicate acts of the conspiracy. Thus, this particular statement of the law became the law of the case. *Id.*

The *Abod* decision involved whether the Government must prove that a defendant had knowledge that a credit card was counterfeit in a prosecution for using counterfeit credit cards. However, the jury at trial was instructed that the defendant could not be convicted of using a counterfeit card unless the Government proved that he knew the card was actually counterfeit. Since the Government did not object to this instruction, the instruction and the requirement that the defendant have knowledge of the counterfeit nature of the credit card became the law of the case. *Abod,* 770 F.2d at 1295 n.1. Since the *Abod* court invoked the law of the case doctrine, it did not reach the ultimate question of whether knowledge of the counterfeit nature of the card was a requisite element. *See id.*

These decisions are directly applicable to this case. The government's jury instructions contained materiality as a requisite element. The instructions that included materiality thus became the law of this case. Even if this Court chooses to address the general question whether materiality is an element in section 1014 cases, there is no question that materiality became a requisite element in this case under the law of the case doctrine.

C. Failure to Object

In addition to the indictment and the jury instructions, the Government did not lodge any objection, or otherwise make a record before the district court, that materiality should not be an element of section 1014. In this instance, the district judge

determined the issue of materiality.[8] The Government stood silent when this determination was made. The Government did not object or otherwise assert that materiality should not be determined, by either the judge or the jury, when these rulings were made.

A principal rule of appellate procedure is that, when a litigant fails to raise a challenge in a timely fashion, or concedes an issue below, it cannot be raised in later proceedings. *See, e.g., Steagald v. United States*, 451 U.S. 204, 208-09 (1981); *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1106 (6th Cir. 1989); *United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984). Counsel cannot remain silent, let the claimed error take place, and then object to the error later. *United States v. Carr*, 965 F.2d 408, 411 (7th Cir. 1992). *See also United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987) (jury instruction that contained materiality in a section 1014 prosecution was permissible because materiality has been recognized as an element, and the Government did not object to the jury instruction). The Government should not now be allowed to reverse itself and take a contrary position from its position at trial.

Further, the Government is precluded from raising this issue under the invited error doctrine. A party is precluded from arguing on appeal those errors which he invited or provoked the court below to commit. *See, e.g., United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 400 (1993); *United States v. Schmurstein*, 977 F.2d 449, 455 (8th Cir. 1992); *United States v. Ward.*, 914 F.2d 1340,

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8. Both respondents objected to the judge determining materiality instead of the jury and thus properly preserved the record in this regard. The district judge agreed with the respondents that the issue of materiality should be submitted to the jury, but he felt bound by then controlling Eighth Circuit law which mandated that materiality was an issue for the court and not the jury. Pet. App. 8a n.4; Record 1737.

1344 (9th Cir. 1990). *See also United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 344 (1995). Instead of objecting or otherwise arguing that materiality should not be an element, the Government chose to stand silent and allow materiality to be a critical and essential aspect of the trial below.

Interestingly, the Government's opening briefs submitted to the Eighth Circuit on appeal also acknowledged that materiality was an element of section 1014. J.A. 50-60. Only after the *Gaudin* decision and the Eighth Circuit's request for supplemental briefs did the Government claim for the first time that materiality is not an element under section 1014. *See* J.A. 61-77.

The Government's suggestion that it had no reason to raise this challenge prior to the *Gaudin* decision because district judges routinely determined materiality in the Government's favor exhibits an inherent distrust for our jury system long praised as the most fundamental aspect of our criminal justice system. Pet. for Cert. 13-14. The issue whether the judge or the jury determines materiality should be irrelevant to the Government's argument in this case. Only after *Gaudin* shifted the responsibility of determining materiality to a jury did the Government raise its new argument regarding materiality in an attempt to avoid the mandate of *Gaudin*, a mandate that the government clearly dislikes.

The Government's prayer for relief further amplifies the procedural difficulties presented in this particular case. The Government simply prays that the Eighth Circuit decision should be reversed and, presumably, the convictions from the district court should be affirmed. However, if the relief prayed for by the Government was granted, this Court would affirm convictions in which materiality *was* an element of 18 U.S.C. § 1014 and in which the judge, rather than the jury, determined materiality. The first instance would be the exact opposite result of the Government's argument herein, while the second

instance would violate the mandate of *United States v. Gaudin*, 115 S. Ct. 2315 (1995). These procedural difficulties are the precise reason why courts have developed and recognized doctrines, such as the law of the case, which prevent a litigant from reversing its position on appellate review. The decision of the Eighth Circuit must be affirmed.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE.

Throughout the course of this trial, materiality was "hotly contested" and a very significant aspect of the proof adduced at trial. *See United States v. Wells*, 63 F.3d 745, 749 (8th Cir. 1995). At the close of all of the evidence, the district court determined that the statements in issue were material, over the respondents' objections that materiality should be submitted to the jury. Pet. App. 8a n.4.

During the appeal of the convictions to the United States Court of Appeals for the Eighth Circuit, this Court decided *United States v. Gaudin*, 115 S. Ct. 2315 (1995). The *Gaudin* decision involved 18 U.S.C. § 1001, which criminalizes making false statements in a matter within the jurisdiction of a federal agency. The parties in *Gaudin* stipulated that materiality was an element of the offense under section 1001. *See Gaudin*, 115 S. Ct. at 2313.[9] The issue presented was whether the jury or the judge should determine materiality.

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9. It should be noted that while the first phrase creating a violation of section 1001 uses the word "material" as an adjective to qualify the word "fact," "material" is not used in the second phrase creating a violation of section 1001. The statutory language which identifies a violation of section 1014 parallels the language of the second phrase of section 1001.

This Court held that criminal convictions must rest on a jury determination that the defendant is guilty of every element of a crime beyond a reasonable doubt. *Gaudin*, 115 S. Ct. at 2313. A defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether the element of materiality has been established. *Id.* Thus, *Gaudin* requires that when materiality is an element of the offense, it must be submitted to and determined by the jury.[10]

After the *Gaudin* decision, the Eighth Circuit requested supplemental briefs from the parties regarding the applicability of *Gaudin* to this case. Only after this request for supplemental briefs did the Government claim for the first time that materiality is not an element under section 1014. J.A. 61-69. However, the Eighth Circuit recognized that materiality has long been recognized as a requisite element under 18 U.S.C. § 1014. Pet. App. 12a. Moreover, the Eighth Circuit recognized that fraud statutes similar to section 1014, which do not explicitly enumerate materiality in the text of the statute, nevertheless have been found by a number of courts to require materiality as an element of proof. *See* Pet. App. 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980)). The Eighth Circuit saw no reason to treat section 1014 differently than similarly worded false statement statutes, like section 1001. Pet. App. 12a. Thus, the Eighth Circuit explicitly recognized and restated the rule that numerous other courts have previously

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10. After the *Gaudin* decision, this Court has granted certiorari, vacated the judgment, and remanded several similar cases for further consideration in light of *Gaudin*. *See, e.g., Knapp v. United States*, 116 S. Ct. 666 (1995) (conviction involving the filing of false currency transaction reports was remanded in light of *Gaudin*); *Daughtry v. United States*, 116 S. Ct. 510 (1995); *Gatewood v. United States*, 116 S. Ct. 510 (1995) (conviction for making a false statement to the Navy was remanded in light of *Gaudin*); *Waldron v. United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. § 1014 remanded in light of *Gaudin*); *Porat v. United States*, 115 S. Ct. 2604 (1995) (conviction under 18 U.S.C. § 1623, remanded in light of *Gaudin*).

adopted, that materiality is an essential element of section 1014. *Id.*

A. Nearly Every Federal Circuit has Found Materiality to be a Requisite Element of 18 U.S.C. § 1014

Nearly every federal circuit, with the exception of the Second Circuit, has held that materiality is a requisite element of 18 U.S.C. § 1014. *See, e.g., United States v. Nash*, 76 F.3d 282, 284 (9th Cir. 1996); *United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), *cert. denied*, ___ U.S. ___ 1996 U.S. LEXIS 3962 (1996); *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1993); *United States v. Haddock*, 956 F.2d 1534, 1549 (10th Cir. 1992), *cert. denied*, 506 U.S. 828 (1992); *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990); *United States v. Shriver*, 842 F.2d 968, 976-77 (7th Cir. 1988); *United States v. Ryan*, 828 F.2d 1010, 1013-14 & n.1 (3rd Cir. 1987); *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987); *United States v. Whaley*, 786 F.2d 1229, 1231 (4th Cir. 1986); *United States v. Scott*, 701 F.2d 1340, 1345 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983); *United States v. Mangieri*, 694 F.2d 1270, 1279 n.8 (D.C. Cir. 1982). In addition, federal courts have recognized that materiality, although not necessarily included in the actual text of the statute, is nevertheless a requisite element of other false statement statutes. *See, e.g., United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975) (to exclude trivial falsehoods, courts have read a materiality requirement into the second clause of 18 U.S.C. 1001); *United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (18 U.S.C. § 287 should be treated no differently than 18 U.S.C. § 1001; materiality is thus an element of section 287).

The only circuit that has not explicitly recognized materiality as an element of a section 1014 offense is the Second

Circuit. In the 1977 opinion of *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978), the Second Circuit rejected an argument advanced on appeal that the trial court erred in failing to instruct the jury that the statements made were false as to a material matter. *Cleary*, 565 F.2d at 46. In its decision, the *Cleary* court quoted a previous Second Circuit decision which had rejected the argument that actual reliance by the bank on the false statements is an element under section 1014. *United States v. Sabatino*, 485 F.2d 540, 574 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). Quoting *Sabatino*, the *Cleary* court stated that "[i]t does not lie with one knowingly making false statements . . . to say that the statements were not influential or the information not important." *Cleary*, 565 F.2d at 46 (*quoting Sabatino*, 485 F.2d at 574). However, the *Cleary* opinion goes on to state that "[i]n any event, any question of materiality would be for the court, not the jury." *Cleary*, 565 F.2d at 46. By this second statement, the Second Circuit seemed undecided as to whether materiality is not an element of section 1014, or whether materiality is an element but should be determined by the court. In light of the fact that *Cleary* is not clearly decisive as to this issue and in light of the fact that *Cleary* was decided some time ago, the Second Circuit's view of materiality is not persuasive.

The element of materiality has deep-rooted foundations in the area of criminal false statements. In recognizing materiality as a requirement for section 1014 offenses, the Fifth Circuit noted that materiality was an element in false statement offenses, like perjury, at common law:

> Sir Edward Coke wrote in 1680 that perjury is a crime committed by one "who sweareth absolutely, and falsely in a matter material to the issue." 3 E. Coke, Institutes 164 (6th ed. 1680). Otherwise, as Blackstone stated, "if it only be in some trifling collateral circumstance, to which

> no regard is paid, it is not penal." 4 W. Blackstone, Commentaries *137.

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994). The *Williams* court noted that "[s]ection 1014 was not designed to convict on a technicality." *Id.* at 458.[11] Implicit in the overwhelming majority of federal appellate court opinions is the need to filter out criminal convictions based on such trivial or harmless statements, even if the defendant's purpose or intent was otherwise unlawful.

B. The Actual Text of the Statute Does not Indicate that Materiality Cannot be an Element of a Section 1014 Offense

The actual text of section 1014 does not contain an explicit reference to materiality. Nevertheless, appellate courts have historically determined that materiality should be an

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11. Materiality has also been included in the definitions of criminal offenses involving deception. For example, the Model Penal Code defines the term "deceives" as used to define the offense of theft by deception, as follows:

> The term "deceives" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

See The American Law Institute, THE MODEL PENAL CODE, § 223.3 (1980). Additionally, the Model Penal Code includes materiality in its definition of perjury. *See id.* at § 241.1, at 116 n.52 (recognized that materiality was an element of perjury at common law). Similarly, the definition of false swearing uses materiality as a grading factor to determine whether the falsification is treated as a felony or a misdemeanor. *See id.* at § 241.2(1)(a). Thus, materiality has been recognized in various criminal contexts as a required element of proof in false statement offenses.

element of the offense, even though it is not explicitly enumerated in section 1014.

It is true that the starting point in any issue of statutory construction is the actual text of the statute. However, when Congress has not addressed a specific issue or has done so ambiguously, statutory interpretation ceases to be solely a problem of discovering the plain meaning of the statute.[12]

There are numerous situations where courts have looked beyond statutory language that appears rather clear in the text of the statute, but becomes ambiguous in application. For

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12. The Government's suggestion in this case that the actual text of the statute is controlling, runs contrary to the position that courts have taken regarding the interpretation of section 1014. Thus, some of the allegations in the present case involved an omission, i.e., that the Respondents failed to disclose to the banks that there was a separate service agreement in addition to the leasing agreements. A strict reading of the textual language of 18 U.S.C. § 1014, as suggested by the Government, does not include the term "omissions" under the definition of the offense. The language of the statute refers to "a false statement or report." It does not refer to omissions nor does it define "statement" to include omitted information. Under a strict application of the government's argument, the conduct of omitting information would not fall within section 1014.

This argument was advanced by the Respondents in the Eighth Circuit. The Eighth Circuit ruled, however, that section 1014 should be interpreted to encompass omissions of material information. *United States v. Wells*, 63 F.3d 745, 751-52 (8th Cir. 1995). Other appellate courts have also construed or interpreted section 1014 to apply to omissions cases as well. *See, e.g., United States v. Haddock*, 956 F.2d 1534, 1549-50 (10th Cir. 1992); *cert. denied*, 506 U.S. 828 (1992); *United States v. Ryan*, 828 F.2d 1010, 1017 (3rd Cir. 1987) (statement includes nonverbal conduct); *United States v. Trixler*, 474 F.2d 369, 370-71 (5th Cir. 1973), *cert. denied*, 412 U.S. 929 (1973). These courts have recognized that most federal statutes are subject to judicial interpretation. In these instances, "omitted information" has been construed to be encompassed within the definition of a "false statement," even though this construction is not supported by a strict, textual reading of section 1014. Like the "omissions" cases, materiality has also been construed to apply to the definition of a false statement. Although the actual text of a statute is a starting point, the analysis should not always end there.

example, this Court has on several occasions implied a mental intent term in federal criminal statutes that do not enumerate such a term. *See, e.g., Morisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419 (1985); *Staples v. United States*, 114 S. Ct. 1793 (1985); *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). Although the text of these statutes seems rather clear, the Court has held that *mens rea* is so fundamental that Congress' silence does not necessarily signal an intent to dispense with those requirements. *Staples*, 114 S. Ct. at 1797.

Courts have similarly looked beyond the text of the Sherman Act to define what conduct is a restraint of trade or commerce or an attempt or conspiracy to monopolize. *See generally* Richard A. Posner, *Statutory Interpretation: In the Classroom and Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) ("Lawyers and judges do not begin their analyses of a challenged practice by comparing the practice with the language of the [Sherman] Act . . . . They start with case law and may never return to the statutory language."). Additionally, courts have held that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, does not apply to domestic relations cases, despite any mention of "domestic relations" in the text of the statute. *See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 512-15 (2d Cir. 1973). These examples demonstrate that the text of a statute often times must be interpreted by courts to effect its true purpose.

C. The Legislative History of Section 1014 Does not Indicate an Intent by Congress to Dispense With the Materiality Element

The Government's reliance on congressional intent and the legislative history of section 1014 is also misplaced. The Government suggests that since section 1014 was a consolidation of thirteen predecessor statutes, some of which

contained materiality and some of which did not, then Congress must have somehow intended to delete materiality as an element of the offense. Govt. Br. 13-15. However, the legislative history of section 1014 is completely silent regarding materiality.[13]

At most, the legislative history of section 1014 creates an ambiguity of congressional purpose that must be resolved in favor of the Respondents. It is difficult to determine if congressional silence indicates that the text represents acquiescence in a particular interpretation or if Congress simply was not aware of the issue. This is why this Court has not always been convinced that legislative silence indicates acquiescence. The silence of the legislature can be construed as consistent with the intent to leave the problem as it remains as much as it can be consistent with an adoption of a case rule by simple silence. *See Girouard v. United States*, 328 U.S. 61, 69-70 (1946). It is impossible to assert with any degree of certainty that Congress' silence on the issue represents:

> 1) approval of the status quo, as opposed to 2) inability to agree upon how to alter the status quo, 3) unawareness of the status quo, 4) indifference to the status quo, or even 5) political cowardice.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 672 (1987) (*Scalia, J., dissenting*).

In *Boys Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), the Court re-examined the holding

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13. The Government also suggests that Congress is familiar with the holdings of the federal courts and should have been familiar with the holding in *Kay*. Govt. Br. 18. However, as stated *infra*, Section F, *Kay* involved actual reliance and did not explicitly address materiality, except for the one statement regarding the importance of the information.

in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), concerning the anti-injunction provisions of the Norris-LaGuardia Act. In the opinion authored by Justice Brennan, the Court held that conclusive weight should not be accorded to the failure of Congress to respond to the *Sinclair* holding on the assumption that congressional silence indicates congressional acceptance. The Court cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Boys Market*, 398 U.S. 241-42 (*quoting Girouard*, 328 U.S. at 69-70). Justice Brennan further stated that in the absence of "any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance . . ., the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision." *Id.*, at 241-42 (citing *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940)).[14]

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14. *Compare Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987); *United States v. Shabani*, 115 S. Ct. 382 (1994). The Court in *Johnson* relied in part on Congress' inaction in regards to a "widely publicized decision that addressed a prominent issue of public debate," Title VII affirmative action plans, to support their holding. 480 U.S. at 629 n.7. Due to the highly publicized issue and decision in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1987), the Court believed that legislative inattention was not a plausible explanation for congressional inaction and that Congress had an opportunity to demonstrate disagreement with the holding. Likewise, *Shabani* involved the exclusion of an overt act requirement in the drug conspiracy statute, 21 U.S.C. § 846. The legislative history did not address the overt act requirement, which is an explicit requirement under the general conspiracy statute, 18 U.S.C. § 371. This Court noted that Congress' silence in this case "speaks volumes." *Shabani*, 115 S. Ct. at 385. However, the Court relied in large part on the fact that the same session of Congress passed another statute in that same year, the Organized Crime Control Act of 1970, 84 Stat. 922 § 802(a), which contained an explicit overt act requirement. Unlike *Shabani*, the enactment of section 1014 in this case included Revisor's Notes indicating that no substantive changes were intended by the consolidation. Thus, Congress' general silence coupled with Revisor's Note cannot "speak volumes" as to Congress' intent regarding materiality. If anything, the Revisor's Notes "speak volumes" that Congress did not even consider materiality to any degree. Thus, *Shabani* is distinguishable from the present case.

However, if the silence of Congress is utilized to interpret section 1014, the recent amendments to the statute should also be considered. Some of these recent amendments were passed after the numerous federal appellate opinions were written that recognized materiality as a requisite element of section 1014.[15] Although these amendments have generally involved the addition of federal entities to the ambit of the statutory prohibition, Congress should be deemed to be aware of the numerous appellate decisions from nearly every federal circuit that recognized materiality as an element of section 1014, as well as many other false statement statutes. This congressional silence during all of these recent amendments may indicate that Congress was in agreement with these federal circuits since it took no action to clarify, amend, or overrule the appellate courts' decisions regarding materiality.

In addition, the legislative history of section 1014 indicates that Congress overlooked the materiality issue entirely, thus creating an amibiguity as to the intent of Congress. As stated previously, the Reviser's Notes following section 1014 reveals that Congress made changes to the phraseology of the original statutes to "secure uniformity of style . . . but the consolidation was without change of substance except as noted [in the revisor's notes]." *See* 18 U.S.C. 1014, Revisor's Notes (1976).[16]

This statement by the Revisor of Statutes is a clear indication that Congress may have completely overlooked the

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15. *See generally* Revisor's Notes, 18 U.S.C. § 1014.

16. The only changes of any substance indicated in the revisor's notes involved the form of punishment proscribed and an enumeration of the terms and transactions incorporated into the statute. *Id.*

fact that some of the predecessor statutes contained materiality while others did not. There is no question that the deletion of the materiality requirement from some of the predecessor statutes would constitute a material change of the law in substance. Thus, Congress did not intentionally delete the element of materiality or even consider it to any degree.

The ambiguities created by congressional silence have been addressed by this Court in cases involving statutes that lack a mental intent term in the definition of the offense. In these cases, the Court has noted that silence regarding mens rea does not necessarily suggest that Congress intended to dispense with a mental intent requirement. *See, e.g., Staples v. United States,* 114 S. Ct. 1793, 1797 (1994).

As discussed *supra*, this Court has implied a mental intent element where no such element was stated in the text of the statute. Just as the element of mens rea protects a citizen from being criminally punished for inadvertent conduct, materiality protects a citizen from suffering harsh criminal penalties for trivial or insignificant matters. Both concepts are rooted in our system to ensure fairness when harsh criminal penalties are involved.[17]

D. The Application of the Rule of Lenity

As discussed above, the congressional silence regarding materiality in the original enactment of section 1014, as well as the Revisor's Notes indicating that no substantive changes to the law was intended as a result of the consolidation, creates an

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17. Another longstanding canon of statutory construction is that statutes should be construed to save them from being invalidated and to avoid serious constitutional questions. *See, e.g., United States v. Rumely,* 345 U.S. 41, 45 (1953). This canon has been utilized by various courts to save a statute from vagueness, overbreadth, constitutional questions, and other legal deficiencies.

ambiguity as to the true purpose of Congress. When such ambiguity exists, this Court has held that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *See, e.g., Liparota,* 471 U.S. at 427.

> Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear.

Liparota, 471 U.S. at 427. The rule of lenity applies only when, after consulting traditional canons of statutory construction, a court is left with an ambiguity. *E.g., United States v. Shabani,* 115 S. Ct. 382, 386 (1994); *Staples v. United States,* 114 S. Ct. 1804 n.17 (1994). *See generally,* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 59.03 at 102 (5th ed. 1992) (rule of lenity in determining ambit of criminal statutes is particularly appropriate where legislative history of statute is not clear). Clearly, the rule of lenity would require that materiality is an element.

E. When Congressional Drafting Errors Occur, Courts are not Bound to Read Statute Literally

Where the legislative history indicates that Congress has made a drafting error, courts are not necessarily bound to read the statute literally. *See, e.g., United States v. Falvey,* 676 F.2d 871, 875 (1st Cir. 1982). In *Falvey,* the court analyzed a newly revised statute involving the crime of possessing false, forged or counterfeit coins. The legislative history indicated that the only change intended was for the Act to cover any coins in excess of five cents. *Id.* at 875. However, the amended statute also deleted from the statute a long-recognized definition that limited

the scope of this statute to foreign coins only in current circulation. *See id.* at 874. In determining whether it should apply this limitation, the First Circuit held that Congress did not intend to substantially change the statute in light of the legislative history indicating that Congress did not intend to make any substantial changes. *Id.* at 875. The First Circuit held that courts are not bound to read a statute literally in a manner inconsistent with the history and apparent intent of Congress. *Id.*; *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 849 (1992) (discussing the *Falvey* decision). Here, the Revisor's Notes to section 1014 clearly indicate that no substantive changes were intended by Congress. Thus, the language of section 1014 need not be read literally and it is appropriate to require materiality as a requisite element.

F. The Government's Reliance on *Kay*, *Williams*, and *Kungys* is Misplaced

The Government cites *Kay v. United States*, 303 U.S. 1 (1938), for the proposition that materiality is not an element of section 1014. However, *Kay* involved a predecessor statute to section 1014, 12 U.S.C. § 1467(a) (1933), which prohibited making a false statement or willfully overvaluing any security for the purpose of influencing the Home Owner's Loan Corporation. *See Kay*, 303 U.S. at 3, n.1. In *Kay*, the petitioner argued that the statements would not have directly influenced any loan made by the corporation. The Court held that one charged with making a false statement cannot claim that the "statements were not influential or the information not important." *Kay*, 303 U.S. at 5-6. The only possible portion of the *Kay* decision that involves materiality is ostensibly the language that a defendant cannot claim that the "information is not important."

Thus, *Kay* does not support the government's arguments. The opinion was pronounced in 1938 and involved a different statute. *Kay* clearly addressed the issue of not having to prove actual reliance by the bank, but did not analyze or address the issue of materiality, except for the one sentence regarding the importance of the information. Several appellate courts have cited *Kay* for the general rule that actual reliance on behalf of the financial institution is not an element of the offense defined in section 1014. *See, e.g., United States v. Stephens*, 779 F.2d 232, 237 (5th Cir. 1985); *United States v. Johnson*, 585 F.2d 119, 124 (5th Cir. 1978); *United States v. Goberman*, 458 F.2d 226, 229 (3rd Cir. 1972). However, these decisions in the very same discussion of *Kay* recognized or concluded that materiality is a requisite element of section 1014. Thus, these courts clearly view *Kay* as an actual reliance case, and not dispositive or applicable to the issue of materiality. *Kay* is inapplicable to the issues presented in this case.

The Government also suggests that *Williams v. United States*, 458 U.S. 279 (1982), may suggest that materiality is not an element of section 1014. Govt. Br. at 15 n.7. In *Williams*, this Court enumerated the elements necessary to obtain a conviction under section 1014 as follows:

> (1) That the defendant made a "false statement or report," "willfully overvalue[d] any land, property or security," and
>
> (2) That he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance . . . commitment, or loan."

Williams, 458 U.S. at 284. It is true that the Court did not enumerate a materiality requirement in its discussion of section 1014. However, it is also true that the Court did not explicity reject materiality or even discuss it to any degree in its opinion.

As the Government points out, the issue of materiality was not presented to the Court. Furthermore, many circuits have continued to recognize materiality after the *Williams* decision. *See United States v. Ryan*, 828 F.2d 1010, 1014-15, n.1 (3d Cir. 1987). The *Ryan* Court did not view *Williams* as an implicit rejection of the materiality requirement by this Court. *See id.* Thus, Respondents submit that *Williams* is not dispositive to the issue of materiality one way or the other.

Kungys v. United States, 485 U.S. 759 (1988), cited by the Government, is also distinguishable from the present case. *Kungys* involved 8 U.S.C. § 1101(f)(6), which provides that a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" naturalization benefits. In concluding that materiality was not a requisite element of this statute, the Court noted that the purpose of the statute was to actually identify a lack of good moral character, instead of generally protecting the naturalization process from falsities. *Kungys*, 485 U.S. at 780. Thus, this particular statute was concerned with any act of misrepresentation that would be relevant to determine moral character.

Unlike the statute in *Kungys*, section 1014 does not involve a determination of good moral character. The *Kungys* opinion even acknowledges that a previous Supreme Court decision read a materiality requirement into a statutory element that did not explicitly contain materiality. *Kungys*, 485 U.S. at 781 (citing *Fedorenko v. United States*, 449 U.S. 490 (1981) (materiality applies to willful misrepresentation element even though materiality not in text of the statute)). The Court distinguished the statute in *Fedorenko* from the statute in *Kungys* because the term "misrepresentation" was used, which has a long history of a materiality implication. *See Kungys*, 485 U.S. at 781. Thus, the statute in *Fedorenko*, which contained "misrepresentation," should have a materiality element implied as recognized by common law. However, the *Kungys* Court did

note that it was not prepared to state that the element of "false" can never imply a requirement of materiality. *Id.* Seeing that the law of false statements has long recognized materiality as an element at common law, the *Kungys* opinion actually suggests that it would be permissible to read materiality into section 1014.

G. There are Good Reasons to Require Materiality in Section 1014 Prosecutions

One of the concerns voiced by some courts in recognizing the element of materiality is the highly penal nature of federal false statements statutes. For example, the statutory range of punishment under section 1014 is a term of imprisonment not more than 30 years, a fine of not more than $1,000,000, or both. 18 U.S.C. § 1014. Due to the harsh nature of the potential criminal penalties involved, courts have required that the element of materiality be taken seriously. *See, e.g., United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994); *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975) (section 1001 case). Concerns of harsh criminal penalties have been recognized by this Court in numerous contexts. *See, e.g., Williams v. New York*, 337 U.S. 241, 247 (1949) ("A prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime."); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (Court was concerned that a suggested interpretation of a statute would criminalize a broad range of apparently innocent conduct); *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994) (the potentially harsh penalties attached to a violation of the statute in question was a consideration by the Court in its ruling regarding the requirement of a mental intent element).

Another long-recognized canon of statutory construction is that criminal statutes are to be strictly construed. *See, e.g., Smith v. United States*, 360 U.S. 1, 9 (1959); *United*

States v. Beer, 518 F.2d 168, 171 (5th Cir. 1975). "The rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820); *see generally* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 59.05, at 126 (5th ed. 1992) (strict construction of penal statutes is founded on policy of protecting the interests of those against whom penalties are sought to be enforced). Under this canon of construction, when courts analyze a pervasive, all-encompassing statute, such as section 1014, they are extremely careful to insure that reasonable limits are observed. *Beer*, 518 F.2d at 170. This canon of construction, coupled with the ambiguities created by the enactment of section 1014, all support the element of materiality in section 1014, as recognized by the numerous federal appellate courts.

The importance of ensuring that reasonable limits are imposed on broad criminal statutes, such as section 1014, was discussed in *Staniforth*, 971 F.2d at 1355. Writing for the Seventh Circuit, Judge Posner concluded that the requirement of materiality prevents the statute from punishing harmless or trivial attempts. *See Staniforth*, 971 F.2d at 1358. *See also Beer*, 518 F.2d at 170-71 (to exclude trivial falsehoods from the purview of the statute, courts have required a materiality requirement under the second clause of 18 U.S.C. 1001). Without materiality, Judge Posner felt that the potential reach of section 1014 would be greatly expanded with few benefits. *Staniforth*, 971 F.2d at 1358. Such an expansion of section 1014, without materiality, would lead to unnecessary litigation over trivial or immaterial statements, and would violate the interests of justice.

III. IF THIS COURT DETERMINES THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014, THEN THE CASE MUST STILL BE REMANDED FOR A NEW TRIAL BECAUSE THE JUDGE'S DETERMINATION OF MATERIALITY AND INSTRUCTION TO THE JURY TO DISREGARD MATERIALITY ESSENTIALLY TOOK AWAY FROM THE JURY'S DETERMINATION THE ELEMENTS OF "PURPOSE OF INFLUENCING" AND WHETHER THE STATEMENT WAS "FALSE."

The government argues that the element enumerated in section 1014, which requires that the statement be made "for the purpose of influencing in any way the actions" of a covered institution forecloses or precludes a separate materiality requirement. Govt. Br. 20-22. The Government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks. Govt. Br. 21. Thus, the Government suggests materiality is an element of the offense, but argues materiality qualifies "purpose of influencing" but not the false statements themselves.

The "purpose of influencing" language in section 1014 places emphasis on the defendant's intent, while materiality looks to the actual statements made and the nature of those statements. It is possible that a defendant could make a trivial or harmless statement with the purpose or intent to influence the bank's decision.

This distinction has been noted where materiality has been recognized as separate and distinct from the defendant's specific mental intent. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960-61 (1st Cir. 1995), *cert. denied*, ___ U.S. ___, 1996 U.S. LEXIS (1996) (the question of purpose or the defendant's specific intent differs from materiality; purpose

could exist without materiality and vice versa). The issue of the defendant's specific intent is generally a subjective inquiry, while issues of materiality involve an objective inquiry. The government's suggestion that "for the purpose of influencing" must necessarily include or encompass materiality confuses these two separate and independent concepts.

Thus, although the Respondents submit that materiality is a separate concept from intent, the government's argument, taken as true, raises additional problems. If these two concepts are inextricably linked together, as suggested by the Government, then the judge's instruction that defines materiality for the jury and then tells the jury not be concerned with determining materiality essentially took away from the jury the element of "for the purpose of influencing." In this regard, Respondents adopt herein the Amicus Brief submitted by NACDL, which expands upon this issue at greater length.

In addition to the element of "for the purpose of influencing," the jury instructions in this case defined a "false statement" using materiality. Instruction 20 stated as follows:

> A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

J.A. 42. After defining a false statement, using materiality, the judge goes on to instruct the jury that:

> The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are to be concerned and should not be considered by you in

> determining the guilt or innocence of the defendant.

J.A. 44. How can these convictions be affirmed when the very definition of a false statement, an undisputed element for the jury to determine under section 1014, utilizes materiality? The judge's determination of materiality thus took this element away from the jury's consideration.

If this Court were to hold that materiality is not an element of section 1014, it is still not possible to simply affirm the convictions at the district court level. As raised earlier, materiality was charged and included as an element below, and was determined by the judge instead of the jury. Further, the judge's materiality instructions effectively precluded the jury from determining whether the statement was false and whether the Respondents acted with the purpose of influencing a financial institution. For these reasons, in the event that this Court would determine that materiality is not an element, this case still must be remanded to the district court for a new trial.

CONCLUSION

For the reasons set forth herein, the opinion of the United States Court of Appeals for the Eighth Circuit should be affirmed in all respects. However, if this Court would determine that materiality is not an element of section 1014, the Eighth Circuit opinion should nonetheless be affirmed because the Government conceded that materiality is an element in this particular case. Finally, alternatively, this case should be remanded for a new trial because the judge's determination of materiality took away from the jury's determination certain elements under section 1014: (1) that an act be done for the prupose of influencing a financial institution; and (2) that the statement made was false.

Respectfully submitted,

JAMES R. WYRSCH
(Counsel of Record)
RONALD D. LEE
W. BRIAN GADDY
WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
1101 Walnut Street, Suite 1300
Kansas City, MO 64106-2122
(816) 221-0080
Attorneys for Respondents